STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2005
v	No. 255396 St. Joseph Circuit Court
KURT ALAN BURKHARDT, Defendant-Appellant.	LC No. 03-011858-FH

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Defendant appeals as of right a jury trial conviction of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a second habitual offender, MCL 769.10, to seven to twenty nine years' imprisonment, and he was ordered to pay costs and make restitution. Defendant appeals as of right. We affirm defendant's conviction, but vacate, in part, the judgment of sentence and remand for resentencing.

Defendant argues that he was denied a fair trial because the prosecutor made improper comments during closing arguments that suggested the existence of a videotape showing defendant's confession, where at trial the only evidence of this confession was the testimony of an investigating detective who interrogated defendant, and which comments suggested that the police had fully investigated and eliminated other identified suspects, where at trial there was no such supporting evidence. Defendant also argues that counsel was ineffective for failing to object to the improper commentary.

Defendant failed to object to the comments at trial; therefore, the issue is not preserved for appeal. *People v Watson,* 245 Mich App 572, 586; 629 NW2d 411 (2001). Accordingly, we review for plain error affecting the defendant's substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). The plain error must result in prejudice to the defendant, i.e., "that the error affected the outcome of the lower court proceedings." *Id.* at 763. Additionally, once an appellate court finds plain error affecting the defendant's substantial rights, reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

Furthermore, with respect to a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that that the deficient performance

prejudiced the defense. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *Id.* (citation omitted).

A prosecutor may argue all reasonable inferences from the evidence but may not make statements of fact unsupported by the evidence or mischaracterize the evidence presented. *Watson, supra* at 588. Prosecutorial misconduct is reviewed on a case by case basis, and the prosecutor's remarks are examined in context to determine if the defendant was denied a fair and impartial trial. *Id.* at 586.

Although the prosecutor's remarks were inappropriate as there was a lack of supporting evidence, on careful examination of the record, we find that defendant has failed to meet his burden of establishing prejudice, either for purposes of the plain-error test or the claim of ineffective assistance of counsel. The prosecutor's comments were extremely brief and not repeated, defense counsel specifically argued to the jury that the police witness did not testify that other suspects were investigated and eliminated, the trial court instructed the jury that "[t]he lawyers' statements and the arguments are . . . not evidence," and there was sufficient evidence connecting defendant to the crime. Reversal of the conviction is unwarranted.

With respect to defendant's argument that he was improperly sentenced as a second habitual offender under MCL 769.10 because his prior conviction for attempted fleeing and eluding, MCL 257.602a, was only a misdemeanor at the time of the offense in March 1997, we agree. Our review of the Historical and Statutory Notes to MCL 257.602a reveals that at the time the offense was committed in March 1997, simple fleeing and eluding was expressly identified as a misdemeanor punishable by imprisonment for not less than 30 days nor more than 1 year, with the court also being permitted to fine a defendant for no more than $1,000. 1988 PA 406.[1] Furthermore, the complaint relative to the fleeing and eluding charge, as well as other district court documentation pertaining to the charge and conviction, specifically indicate that the crime at issue was a misdemeanor punishable by up to one year in jail and a $1,000 fine. Moreover, the presentence investigation report provides that defendant had no prior felonies, only misdemeanors (11 in total), and that the conviction for attempted fleeing and eluding was a misdemeanor. MCL 769.10 allows a court to enhance a sentence where a defendant "has been convicted of a felony or an attempt to commit a felony[.]" That not being the situation in the case at bar, defendant is entitled to resentencing where his sentence was improperly enhanced under MCL 769.10.

With respect to defendant's argument regarding the imposition of court costs in the amount of $457, "[a] trial court may require a convicted felon to pay costs only where such

[1] Fourth-degree fleeing and eluding, the least serious degree, became a felony pursuant to 1996 PA 587; however, said amendment did not become effective until June 1, 1997. See Historical and Statutory Notes to MCL 257.602a.

requirement is expressly authorized by statute." *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995); see also *People v Antolovich*, 207 Mich App 714, 716; 525 NW2d 513 (1994)(court erred in imposing costs in the absence of statutory authority). The record contains no citation to any authority supporting the imposition of costs, and MCL 750.110a does not provide for costs as a penalty. MCL 750.110a(9) does provide that "[i]mposition of a penalty under this section does not bar imposition of a penalty under any other applicable law." Because we are remanding on the issue of sentence enhancement under the habitual offender statutes, we shall also permit the trial court the opportunity to cite any statutory authority for imposing court costs, if it exists. If not, the imposition of costs shall be vacated.

Finally, with respect to the trial court's order requiring defendant to pay for the installation of the victims' security or alarm system as restitution, we find that said order is permissible under MCL 769.1a(4)(a) and MCL 780.766(4)(a). MCL 780.766(4)(a) provides that when a crime results in physical or psychological harm to the victim, a defendant may be ordered to "[p]ay an amount equal to the reasonably determined cost of medical and related professional services *and devices* actually incurred and reasonably expected to be incurred relating to physical and psychological care." (Emphasis added). The language in MCL 769.1a(4)(a) is nearly identical. The cost of the security system qualifies as a cost for a device reasonably expected to be incurred relating to the victims' psychological care. It is reasonable to conclude that a victim would need and seek the protection of a security system and the comfort that it gives based on the anxiety and worry that would naturally occur following a first-degree home invasion. Indeed, one of the victims testified as to the anxiety created by the home invasion.

> Our home was once a place where I enjoyed nature, gardening, fishing, and the outdoors. We now feel like prisoners. I am constantly looking over my shoulder to see if people like [defendant] are lurking in our woods waiting for an opportunity to take what is not theirs. I wear an alarm device, carry a cell phone, and a pistol when I'm in our woods. We feel like prisoners in our home. Securing our once place of safety to – away from leeches of society. Not only has this affected us financially, it has changed the way we live. We have worked very hard, my husband and I, sometimes fourteen-hour days, six days a week, for people like this criminal to take the easy road.

We affirm defendant's conviction, but vacate, in part, the judgment of sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Alton T. Davis